COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

{Chapter VIII, Rule 32(2) (b)}

Description of the Case.

Criminal Jail Appeal No. 290 of 2004

Babu S/o Phool Singh,
R/o village Malhipur,
Thana Rampur Maniharan,
District Saharanpur

…Appellant

Versus

State of Uttarakhand

….Opposite Party

Sri Gopal K. Verma, Advocate for appellant
Sri Amit Bhatt, learned Addl. G.A. for the State

~~Approved for reporting.~~
Not approved for reporting.

Date: April 23, 2007

(Dharam Veer, J.)

Reserved

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Jail Appeal No. 290 of 2004

Babu S/O Phool Singh
R/o Village Malhipur,
Thana; Rampur Maniharan,
District Saharanpur … Appellant

Versus

State of Uttarakhand …Respondent

Sri Gopal K. Verma, Amicus Curiae for appellant.
Sri Amit Bhatt, Addl. Govt. Advocate. for the State.

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Hon. Dharam Veer, J.

The present appeal has been preferred against the judgment and order dated 04.09.2004 passed by the Additional Sessions Judge/Fast Tack Court First, Roorkee, Haridwar in Sessions Trial No. 281 of 2003 convicting the appellant U/s 376/511 and 363 I .P.C. and sentencing him to undergo rigorous imprisonment for 3 years for committing the offence punishable U/s 376 read with Section 511 I.P.C; and 2 years' R.I. with a fine of Rs. 500/- for committing the offence punishable under Section 363 I.P.C. and in default of payment of fine, he was ordered to undergo further additional simple imprisonment for a period of one month. It was also directed that both the sentences shall run concurrently.

2. The prosecution story is that on 16.05.2003, a written complaint was lodged in the Police Kotwali, Roorkee by complainant Jinda to the effect that on 15.05.2003 Km. Gulshama, aged about 9 years, who was wearing a white scarf, had gone for studies in deenyab Arbi Madarasa, situated in Machhi Mohalla, Roorkee. She had been going there for the last one year for studies, but on 15. 05. 2003 she did not return back from her school. Therefore, he sought help from the Police to trace his daughter.

On the basis of the written report, G.D. entry was made on the same day i.e. on 16.05.2003 vide report no. 26 at 11.30 p.m. in Police Kotwali, Roorkee and efforts for tracing her were made. On 17.05.2003, it came to light through an informer that a person is roaming with a girl of the above description in Kaliyar. On this, the police personnel along with the father of missing girl Gulshama and some other persons went to Kaliyar for her search. They recoverd Gulshama at Kaliyar from the *Tonga* Stand. Gulshama told that on 15.05.2003, when she was coming back from school, the accused met her and told that he is the son of her *Fufi* (aunt) and took her to a shop; kept her bag in a shop of sugar-cane juice vendor; and then took her to Saharanpur. After staying there in the night, he took her to his village. The accused was arrested and a memo of arrest was also prepared.

3. On 18.05.2003, the school bag of the girl was also recovered from the shop of Pravin, the sugar-cane juice vendor. She was also medically examined on 18.05.2003 by Dr. Neelam Kandari, Medical Officer, Govt. Combined Hospital, Roorkee, who found that abrasions were present on the left back and medial side of knee joint. Size 3 cm. length and 3 mm. Breadth, crest present. On examination of the private parts, discharge was not present on labia majora and minora and thighs. Small ulcer 1 X 1 mm. in size present one inch away and below anus. Vagina and hymen reddened in colour and tender on touch. Hymen was circular in shape 2 x 2 mm O in shape, tender in touch. On the basis of the medical report, a charge- sheet was submitted against the accused for committing the offence punishable under Section 363 and 376/511 I.P.C.

4. The investigation of the case was conducted by S.I. Jagvir Singh Tewatia, who recorded the statements of prosecutrix Gulshama, Gulam Mustafa, Suleman, Naib & Ashraf and prepared the site-plan of the place of occurrence. He also obtained the medical report and supplementary report from the Hospital and also recorded the statement of Dr. Neelam Kandari. After completing the Investigation, he submitted charge-sheet against the accused.

5. Thereafter he case was committed to the Court of Sessions by the Special Judicial Magistrate, Roorkee on 19.11.2003. A charge under Section 363, 376/511 I.P.C. was framed against the accused, to which he pleaded not guilty and claimed to be tried.

6. In order to prove its case, the prosecution has examined P.W. 1 Gulam Mustafa, PW. 2 Gulshama, PW.3 Shamim, PW.4 Mohd. Suleman, P.W.5 Dr.Neelam Kandari,S.I. Jagvir Singh and P.W.7 763 Jitendra Singh.

7. P.W. 1 Gulam Mustafa is the father of the prosecutrix. He stated that Gulshama is his daughter. On the date of incident, she was aged about 9 years and used to go from her village to Machhli bazaar, Bharat Nagar for studies by Tempo/Matador, etc. She used to study in Madarsa run by Hadijastulal sect. Other children from the village also used to go in the same Madarsa. On 15.05.2003, when his daughter did not return back from the school, he became worried. When he went to Madarsa, he was informed that on that day schools was closed at 10 a.m. He made her search at Roorkee and nearby places, but she could not be traced. Therefore, he lodged a report in the Police Station. The report was written by Anwar alias Jinda. He, Shamim & Ashraf of his village and Irshad of Patli Gujjar went to Madarsa. The Station Officer was also there. There, someone informed the S.O. that a girl of the description mentioned in the F.I.R. was spotted at Kaliyar. They along with police personnel went to Kaliyar to search the girl and recovered her from there from the custody of accused Babu. The recovery memo was prepared at the spot and signatures of the witnesses were also obtained in Ex.Ka.5. He admitted his signatures on the memo and stated that the girl was handed over to him on the same night. Then, he went to his house. On the next day, his daughter was medically examined. Her school bag was also recovered from the shop of sugar-cane vendor and given in his custody. The *Supurdagi* memo of the same was also prepared at the spot. In his cross-examination, he denied that he knew the accused from before and the girl was above 18 years of age on the date of incident. He admitted that though foot of the accused is not well, he can walk very well.

8. P.W.2 Km. Gulshama stated that she was student of Jamia School, Roorkee and used to go there by Tempo. On the date of incident, the school was closed at 10 a.m. Those were summer days. After closing of the school, when she was coming on the road to board tempo, accused Babu, having a cycle with him, met her. He told her that he was the son of her aunt (Fufi) and would leave her to her house. She had her school bag with her. After walking ahead, the accused kept her bag in the shop of a sugar cane juice vendor and went further after getting her seated in the cycle. On way, he took her to a sugar-cane field and removed her *Salver* by force. Then he inserted his penis to her vagina. On which she wept. The accused threatened her and said if she wept, he would strangulate her. He also commanded not go weep on the way; otherwise, he will strangulate her. He also told her not to disclose the incident to anyone else; otherwise, he will strangulate her. Then he took her from the sugar-cane field to the house of some unknown person, where his cycle was kept. Then he took her to Kaliyar. For two days, they remained there. At Kaliyar, she met with her father, police personnel and her uncle. There, the accused was arrested and she was given in the custody of her father. The police personnel took the accused with them. Then she narrated the whole incident to her father, She was also medically examined. She suffered injuries on her private parts and suffered pain. She was cross-examined at length, but nothing could be extracted which could render her testimony doubtful.

9. P.W.3 Shamim stated that he belongs to the same village where the prosecutix and her father reside. With a view to recover the girl, he alongwith Ashraf, Jinda, Gulam Mustafa and police personnel went to Kaliyar. There at about 11 p.m. at Matador Stand, the girl was traced and the accused was arrested and the girl was given in the custody of her father. This witness was also cross-examined, but nothing could be extracted from him so as to discredit his testimony.

10. P.W. 4 Mohd. Sultan is a formal witness and was posted as Naib Nazim in the Madarsa, where Gulshama used to study in K.G. standard in the year 2003. He stated that the date of birth of girl was 10.8.1995.

11. P.W.6 S.I. Jagvir Singh Tewatia has stated that on 16.05.2003 he was posted at Kotwali Roorkee. The missing report about Gulshama was lodged in the Police Station vide report no. 16 at 11.30 hours. He was entrusted with the investigation of the case on 17.5.2003. He got information that some girl of the above description was seen at Kaliyar fair with some boy. On the basis of this information, the girl was recovered in the presence of Irshad, Nasim , Shamim, Ashraf and the father of the girl Gulam Mustafa at 11 p.m. from the custody of accused Babu. The recovery memo of the same was prepared as Ex. Ka. 5. Then on reaching the Police Station, he started Investigation of the case and recorded the statement of Jinta, who lodged the report, on 16.05.2003. On 18. 06.2003, he took X-ray from the hospital and recorded the statement of the witnesses -Irshad and Nasim and on their pointing out, he prepared the site plan Ex. Ka. 10. On 23.06.2003, he received supplementary report from the hospital and also recorded the short statement of Dr. Neelam Kandari. On 02.07.2003, he got birth certificate of the girl from her Madarsa. On 3.07.2003 he recorded statement of witnesses Kala, Deepti, Raju. After completing the investigation, he submitted charge-sheet Ex. Ka. 11 against the accused.

12. P.W. 7 Constable Jitendra Kumar is a formal witness, who was posted with Head Moharir Jagdish Kumar and is familiar with his handwriting. He brought original G.D. dated 16.05.2003 with him and proved the copy of G.D. and the missing report, which were marked as Ex. Ka. 14 and Ex. Ka. 15 respectively.

13. Dr. Neelam Kandari, P.W.5 has deposed that on 18.05.2003, she was posted in Government Hospital, Roorkee. She examined Km. Gulshama on that day at 10 a.m. and found that abrasions were present on the left back and medial side of knee joint. Size – 3 cm. length and 3 mm. Breadth, crest present. On examination of the private parts, discharge was not present on labia majora and minora and thighs. Small ulcer 1 X 1 mm. in size present one inch away and below anus. Vagina and hymen reddened in colour and tender on touch., Hymen was circular in shape 2 X 2 mm. O in

shape, tender in touch. Smear was taken from hymen and vagina for making slide. She advised her to be taken for X-ray for radiological examination of wrist, elbow, knee joint. In her opinion, she had been tried to touch the sexual part and private parts, One injury on knee back is one week old. Case had been referred for radiological examination. After obtaining supplementary report, she opined that the age of the girl was below 18 years and no spermatozoa found on slide.

14. The statements of the accused were recorded U/s 313,Cr.P.C. He pleaded false implication and claimed to be tried.

15. After hearing the learned counsel for the parties and examining the marterials place on record, the Addl. Sessions Judge/FTC-I, Roorkee held accused guilty for committing the offence punishable under Section 363 and 376/511 I.P.C. and sentenced him as above.

16. Feeling aggrieved of the findings of the Court below, the accused-appellant has filed the present appeal.

17. Sri Gopal K. Verma, the learned Amicus Curiae for the appellant submitted that the judgment and order under appeal are bad in law and is liable to be set aside.

18. Sri Amit Bhatt, the learned A.G.A., on the other hand, supported the judgment of the trial Court and submitted that the judgment and order under appeal do not call for any interference. However, he pointed out that the accused-appellant has already been released from jail on 03.03.2006 after serving out the sentence.

19. I have heard Amicus Curiae and the learned Addl. Government Advocate for the State and perused the entire records.

20. Having considered all the facts and circumstances of the case and going thought the materials placed on record, I am of the opinion that the findings of the learned trial court are based on proper appreciation of the

evidence on record. The prosecution version is also supported by medical evidence. There was sufficient material on record to convict accused-appellant U/Ss 363 and 376/511 I.P.C. and, therefore, the conviction of the accused-appellant is perfectly justified as the same is based on proper appreciation of the evidence. Therefore, no interference is called for on the finding of the trial Court with regard to the conviction and sentence of the appellant under the aforementioned Sections.

21. The accused-appellant has already been released from jail after serving out the sentence vide letter dated 09.04.2007 of Superintendent, District Jail, Haridwar addressed to Joint Registrar, High Court of Uttaranchal.

22. In this view of the matter, the appeal is dismissed and the judgment and order under appeal are hereby affirmed.

Dated: April 23, 2007 **(Dharam Veer, J.)**
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